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LAWYERS IN CONTEXT: MOSES, BRANDEIS AND THE A.B.A.

MILNER S. BALL*

Moses is God's mouth.¹ The facts that God tries to kill him and that he is abandoned to an unmarked grave outside the promised land measure the difficulty of the stories and of representing God.²

My focus in this article is a small segment of the vast Moses saga and its moment for a particular instance of practice, lawyering for the situation. My broader, underlying concern is foundational stories and their shaping presence in our lives. I employ the plural "stories" because, although biblical narrative is for me primary, by its very nature it cannot be exclusive or monopolistic. Its substance and effect are a respect for others that nurtures receptive, vulnerable listening to their stories.³

I. CONTEXTUAL ETHICS AND STORIES

It should be noted that Thomas Shaffer has long served as leader at the forefront of those who explore the biblical tradition's engagement with lawyering, its prophetic challenge to American Bar Association notions of professionalism and ethics, and its consequence for such roles as that of counsel for the situation.⁴ I happily confess my indebtedness to him even though the path I follow diverges from his.

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1. See *infra* note 24 and accompanying text.

2. See *infra* notes 24, 67 and accompanying text.

3. This is not only a matter of tolerance or respect, but also of enlightened self-interest. In the instance of Christianity, other stories have also been necessary as correctives. For example, "the Marxist critique has been . . . necessary for the recovery of Christianity's insistence upon justice in this world . . ." BERNARD DAUENHAUER, PAUL RICOEUR: THE PROMISE AND RISK OF POLITICS 47 (1998). Marx's story may be described as one that recalled Christianity to its own story, a not unusual effect of listening to others.

4. See, e.g., THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS (1985); THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS (1987); THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER (1981); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

Shaffer has provided another bracing example of his work in a recent critique of William Simon's 1998 book, *The Practice of Justice*.⁵ Simon argues that lawyers should practice justice and that they should do so contextually, and his emphasis on these subjects is a welcome addition to the literature on lawyering. It is also a welcome challenge to the established view, according to which legal ethics and professional responsibility are reduced to little, categorical rules that leave scant room for the exercise of moral discretion.

But Simon equates justice with "legal merit."⁶ Shaffer is quick to object that, for some of us, justice cannot be so meanly understood. He notes that for him and others, justice is not derived from law, cultural morality, or the modern nation-state but is informed in the first instance by the biblical stories and is therefore to be understood as righteousness, a "practice following upon love of God and neighbor."⁷

Simon's limited notion of justice limits his understanding of context. In his view contextual decision making requires examining "the relevant circumstances of the particular case" to determine what will promote the legal merits.⁸ In the instance of whether to recommend a tax avoidance device to a client, for example, the attorney's careful, lonely examination will include: interpreting statutory purpose, determining the consistency of the proposed use of the device with that purpose, finding the authoritative relevance of court decisions as determined by her theory of institutional competence, interpreting the purposive basis of those decisions, reviewing her competence theory, arriving at a belief about the clarity of the decisional purpose, and then acting so as not to frustrate a clear statutory-judicial purpose.⁹

Even if an attorney could take these steps without engaging extra-legal commitments and beliefs—and I do not think she could—the context takes too little into account. The problem is not what Simon includes in his recommended inquiry whose

5. Thomas L. Shaffer, *Should a Christian Lawyer Sign Up for Simon's Practice of Justice?*, 51 STAN. L. REV. 903 (1999).

6. WILLIAM SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138 (1998) (also referred to as "basic values of the legal system"). See also *id.* at 10 ("the 'legal merits' of the matter at hand"), 9 ("not an extralegal concept").

7. Shaffer, *supra* note 5, at 904. See also Robin West, *The Zealous Advocacy of Justice in a Less than Ideal World*, 51 STAN. L. REV. 973, 976, 982-83, 984-85, 986, 988 (1999) (offering a powerful critique of Simon's limited notion of justice).

8. SIMON, *supra* note 6, at 9.

9. See *id.* at 146-47.

rigor is commendable. Rather he includes too little. He excludes both client participation in the process and what George Steiner refers to in a different setting as "real presences."¹⁰

Shaffer knows that an attorney is not deracinated. In approaching what to do in a particular case, in wrestling with the decision as Simon would have her do, the attorney does not come isolated from extra-legal resources. Shaffer observes that she comes with the resources of her communities outside the bar. If the attorney is a believer, she comes informed not only by "notions of equality and freedom" but also by her community's "centuries of pondering scripture together, of learning together from theology . . . , and of communal formation in good habits—formation influenced by generations of believers"¹¹

What I find chiefly characteristic of these communities' resources is a sense of context far more generous than Simon's: any situation—personal, institutional, or systemic—is to be discerned within "what God is doing in the world."¹² And what God is doing, Paul Lehmann observed, is "to make and to keep human life *human* in the world."¹³ The community's texts and rituals school believers in discernment of this distinctly political activity of God in the midst of life in order that they may be drawn into participation in it.

God's politics—His "pressure upon people and events"¹⁴—is always particular and requires specific responses of the believer. Because the action and the response are case bound, discernment requires careful factual inquiry that may well include rigorous, Simon-like analysis and consideration of rules, law, principles, and morality. But discernment neither begins nor ends there. The believer comes with some expectation of the

10. GEORGE STEINER, *REAL PRESENCES* (1989).

11. Shaffer, *supra* note 5, at 907.

12. PAUL LEHMANN, *ETHICS IN A CHRISTIAN CONTEXT* 74 (1963):

There is an obvious pretension in the attempt to write about "what God is doing in the world." Such an oracular claim . . . [is inappropriate] to the world of time and space and things. This analysis of what is involved in Christian thinking about ethics, however, disclaims all oracular information. It is not by direct, divine illumination, but by reason of the contextual character of the self-revelatory activity of God in the church, dialectically understood [that this analysis proceeds] [A]ll that is here claimed to be known is what we read in the Bible as well as "in the papers."

13. *Id.* at 99. See also *id.* at 74-86, 347.

14. *Id.*

"beyond in the midst of our life"¹⁵ and some experience in recognizing it from participation in her community's worship and theology.¹⁶

The fit response in the particular case will only sometimes be obvious and will always require some greater or lesser leap of faith. That is why believers are well exhorted to practice humility, live with uncertainty, engage in mutual critique, and rely on forgiveness. Here is no room for "ethical literalism which aims at a one-to-one correlation between" a specific holy text or rule "and a specific action."¹⁷ For the believer, "the *environment* of decision, not the *rules* of decision, gives to behavior its ethical significance."¹⁸ A specific act cannot be said to realize an ethical principle. A specific act will be ethical insofar as it is a sign that "points to fundamental human relations which are both fundamental and human because of what God is doing in the world."¹⁹ A specific act will be ethical if it is indicative of this real, active presence.

This kind of contextual ethics requires a capacity for apperception developed in various ways—by participation in worship and theology but also by, among others, stories. In one of his typically intricate sentences, Paul Lehmann described apperception as "the uniquely human capacity to know something without knowing how one has come to know it, and to bring what one knows in this way to what one knows in other ways, and in so doing, to discern what is humanly true or false."²⁰ His description works best as a performance of its subject. He wagered that readers would have had some experience of apperception and would therefore be able to catch his meaning without knowing exactly how or what.

Arthur Danto has a different way of talking about the same subject. He says that one cannot become, for example, a temperate person by doing things from a list of things temperate people do. "[T]he having of the list is inconsistent with being that sort of person."²¹ He says that what it takes instead is intuition and the ability to judge and act appropriately in situations not

15. DIETRICH BONHOEFFER, *LETTERS AND PAPERS FROM PRISON* 155 (Eberhard Bethge ed. & Frank Clarke trans., 3d ed. 1967).

16. See Shaffer, *supra* note 5, at 906 n.24.

17. LEHMANN, *supra* note 12, at 346-47.

18. *Id.* at 347.

19. *Id.*

20. PAUL LEHMANN, *THE DECALOGUE AND A HUMAN FUTURE* 23 (1994).

21. ARTHUR DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART* 202 (1981).

encountered before.²² Rather than self-help lists—say something like the seven habits of highly successful people—Danto concludes that we require examples “to direct the development of judgment, which is to carry its possessor through unstructured moral and legal spaces. ‘Examples are thus the go-cart of the understanding’. . . .”²³

I put the matter somewhat differently. In place of “intuition” and “examples,” I would say that “apperception” is what it takes and that “stories” are the go-carts. But the aspiration is the same. I, too, would have understanding, the development of judgment, and the enlivening of imagination—the things that carry us through the unstructured places of the world and the heart. And that is why I have turned to the saga of Moses.

II. MOUTH FOR GOD

The Moses in the biblical text is a complex figure of many parts, but he is foremost a person of the law. The text does not say that he is a lawyer. It says that he is “mouth” (*peh*) for God. He speaks for God.²⁴

22. *See id.*

23. *Id.* (quoting Kant).

24. There is a certain amount of risk in the use of the translation “mouth for.” It may entail a prejudicial assumption of meaning. The Hebrew *peh*, “mouth,” may well have been thought of and therefore may well have been something very different in ancient Israel than the mouth is for us.

In addition, “mouth for” may elicit misleading or limiting associations: the lawyer as mouthpiece. The Oxford English Dictionary indicates that “mouthpiece” is a late-developing word, especially as slang for a solicitor. And “mouth for” scarcely has the original sense of that part of a musical instrument made for blowing through.

The image of the mouth was employed by Judge Learned Hand in a more elevated sense. He said that “[t]he judge’s authority depends on the assumption that he speaks with the mouth of others” William J. Brennan, *The Role of the Court—The Challenge of the Future*, in *AN AFFAIR WITH FREEDOM: A COLLECTION OF HIS OPINIONS AND SPEECHES FROM HIS FIRST DECADE AS A UNITED STATES SUPREME COURT JUSTICE* 315, 324 (Stephen J. Friedman ed., 1967). Hand’s point was that judges are charged to decide cases according to law and not simply according to the politics of the moment. They must therefore draw around themselves the legitimating figures of the past. As Hand’s sentence develops, however, various mixings of metaphors underscore his idea that judges must enrobe themselves in something other than a contemporary politics:

The judge’s authority depends upon the assumption that he speaks with the mouth of others, that is to say, the momentum of his utterances must be greater than any which his personal reputation and character can command, if it is to do the work assigned to it—if it is to stand against the passionate resentments arising out of the interests he must frustrate—for while a judge must discover some composition

God introduces the image of the mouth in His first, strange encounter with Moses. God speaks to him from a burning bush and tells him to return to Egypt to deliver the Israelites from slavery. Moses is reluctant and, among other things, objects that he is a poor speaker. In response God explains: "I will be with your mouth and teach you what to speak."²⁵ The image returns at the conclusion of the exchange when Moses' truculent self-effacement at last makes God angry. Enough humility is enough. To Moses' "send someone else," God answers that He will send Aaron as a companion: "You shall speak to [Aaron] and put the words in his mouth; and I will be with your mouth and with his mouth [H]e shall serve as a mouth for you and you shall serve as God for him."²⁶ Moses is to God as Aaron is to Moses: "a mouth for."²⁷ God gives Moses the words he is to speak, and Moses speaks them to the Pharaoh ("Let my people go") and to the people. Moses says he stands "between the Lord and [Israel] to declare to you the words of the Lord."²⁸

That God provides a mouth for Himself is the cardinal gift of enablement to His people. He is characteristically present to them as word. God talks. In the texts, He calls to Moses from the bush and later speaks to him all the words of the law. His voice is to be obeyed.²⁹ He creates by word. He speaks the world into being: "God said, 'Let there be light'; and there was light."³⁰

with the dominant trends of his times, he must preserve his authority by cloaking himself in the majesty of an overshadowing past.

Id. At 324. Judge Hand's use of the image of a "mouth of" is more ennobling than "mouthpiece," but it is nonetheless different from the Mosaic "mouth for." Moses' authority depends upon his serving as mouth for another greater than himself, but, unlike Hand's judge, he does not "cloak" himself with this mouth. Among other differences, the active party is God. God makes Moses His mouth. And the act is not an attempt by God to preserve His authority. It is an act of courtesy.

"Mouth for God" has the advantage of some relation to but no exact match with other conventional terms for the lawyer. For example, it does not exactly fit within any of Thomas Shaffer's (and Robert Cochran's) categories: the lawyer as godfather, or as hired gun, or as guru, or as friend. *See* THOMAS L. SHAFFER & ROBERT F. COCHRAN, JR., *LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY* (1994).

On the notion of representation, see HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* (1967); *REPRESENTATION: NOMOS X* (J. Roland Pennock & John W. Chapman eds., 1968).

25. *Exod.* 4:12.

26. *Id.* 4:15-16.

27. Moses is also "God for" Aaron. While the designation elevates him above Aaron, it is also a reminder that Moses is, in turn, subordinate to God.

28. *Deut.* 5:5.

29. *See Exod.* 19:5.

30. *Gen.* 1:3.

The word of God can be destructive and terrifying. When the people hear the sound of His speaking at Sinai, they are afraid and tremble and stand at a distance. They cannot withstand His words spoken directly to them. God speaks through Moses so that the people can bear His speaking. Through this mouth He is present to His people without consuming them.

III. MOUTH FOR THE PEOPLE

Sometimes, however, especially in the events surrounding Mt. Sinai when God gives the words of the law to Moses for the people, Moses represents the people before God. He is never designated "mouth for" them, but on these occasions he appears to act as *their* mouth, rather than God's. Openly and explicitly in the text he intercedes with God on their behalf.³¹ He does so movingly and effectively. He persuades God to change His mind, and he saves the people from mighty acts of divine retribution. These intercessions appear to be spontaneous and to lack express authorization by either the people or God. They raise the question: For whom does Moses then speak? The question admits of no easy answer.

There are three acute instances of intercession.³² The first occurs just after God gives Moses two tablets of stone on which He has inscribed the Ten Commandments. The narrative of events taking place atop Mt. Sinai is interrupted by the story of idolatry taking place below. In Moses' absence, the people have lapsed into the worship of a golden calf. God tells Moses to go down at once. God wishes to be left alone so that His "wrath may burn hot against them" without intrusion.³³ Moses, disobedient, delays. In that critical circumstance, before he will leave, he will first pause to argue, like a lawyer appearing before an angry judge and refusing to be overpowered:

O Lord, why does your wrath burn hot against your people, whom you brought out of the land of Egypt with great power and with a mighty hand? Why should the Egyptians say, "It was with evil intent that he brought them out to kill them in the mountains, and to consume them from the

31. For the references to a similar office in *Job*, see *Job* 16:20 (witness?); 33:23 (mediator, interpreter?); 19:25 (vindicator, advocate, redeemer?). See also 15 THE ANCHOR BIBLE: *JOB* 146 (Marvin Pope ed. & trans., 1975).

32. There are also later intercessions on the way to Canaan: on behalf of Miriam after her rebellion, see *Num.* 12; on behalf of the people in conjunction with Korah's rebellion, see *Num.* 16:22; for relief from snakes, see *Num.* 21:4-9; and on behalf of the people at the border of Canaan that a successor to himself be appointed lest the people be sheep without a shepherd, see *Num.* 27: 16-17.

33. *Exod.* 32:10.

face of the earth?" Turn from your fierce wrath; change your mind and do not bring disaster on your people. Remember Abraham, Isaac, and Israel, your servants, how you swore to them by your own self, saying to them, "I will multiply your descendants like the stars of heaven, and all this land that I have promised I will give to your descendants, and they shall inherit it forever."³⁴

In response to these arguments that Moses makes from reputation and covenant, "the Lord changed his mind about the disaster that he planned to bring on his people."³⁵ Only then does Moses descend the mountain to contend with the idolators.

The second intercessory moment in the Sinai sequence soon follows. As Moses approaches the encampment and sees Israel enthralled by the golden calf, he smashes the two tablets of stone bearing the Ten Commandments. He then destroys the golden calf and conducts a purge of the sinners. He still fears what God will do to the people who remain. He returns to the mountain to "make atonement" for them.³⁶ Instead of offering arguments this time, he employs a different tactic of a type employed by modern lawyers: He confesses the people's guilt and enters a plea for mercy. He is partially successful. God agrees to let the people continue on their journey to the promised land, but He also vows to punish the guilty "when the day comes."³⁷ In the meantime He sends a plague upon them. When the day does

34. *Id.* 32:11-13. For an interesting account of Moses' argument, see YOCHANAN MUFFS, *LOVE & JOY: LAW, LANGUAGE AND RELIGION IN ANCIENT ISRAEL* 12-13 (1992) (God refers to the Israelites as "your" (Moses') people; Moses refers to them as "your" (God's) people).

35. *Exod.* 32:11-14. One of the intercession's arguments is based on the covenant: if you destroy this people, you will default on your promises. Another relates to reputation: what will the Egyptians say? This argument will be repeated and elaborated in a later intercession for Israel when, after advance spies return from the promised land with unflattering, fearful reports of what awaits them, the people attempt a democratic rebellion: "'Let us choose a captain, and let us return into Egypt.'" *Num.* 14:4. Moses and Aaron entreat them to desist, they do not, and, in terms reminiscent of the Mt. Sinai episode, God vows to do away with them. *See Num.* 14:12. Thereupon Moses argues to God:

[T]he Egyptians will hear of it . . . and they will tell the inhabitants of this land . . . then the nations who have heard about it will say, "It is because the Lord was not able to bring this people into the land that he swore to give them that he has slaughtered them in the wilderness."

Num. 14:13-16. Rumor and public relations have their uses and together with covenantal promises persuade God to change his mind in the *Numbers* as well as the *Exodus* text.

36. *Exod.* 32:30.

37. *Id.* 32:31-35. Caleb and Joshua are the sole exceptions. *See Deut.* 1:35-38; *Num.* 32:11-12.

come, the pioneers must die in the desert short of the promised land. Only the next generation will be allowed to enter, but they will enter.

The third intercession occurs when God orders the people to set out for the promised land but, apparently still nursing His fury, says He will send an angel before them but will not Himself go with them. His absence would clearly be a catastrophe. Without Him, Israel would be defenseless against her enemies in the desert. Moses appeals to God. The place of encounter has shifted from the mountain top to a special tent, the tent of meeting, pitched outside the base camp. A pillar of cloud there has replaced the thunderstorms on the mountain, and the turbulence of Israel's idolatry has given way to calm: "When Moses entered the tent, the pillar of cloud would descend . . . and the Lord would speak with Moses. . . . Thus the Lord used to speak to Moses face to face, as one speaks to a friend."³⁸ In this setting Moses now addresses to God a quietly personal, yet cunning argument that touches on his relationship to God, on God's prior statements, and again on God's reputation:

See, you have said to me, "Bring up this people"; but you have not let me know whom you will send with me. Yet you have said, "I know you by name, and you have also found favor in my sight." Now if I have found favor in your sight, show me your ways, so that I may know you and find favor in your sight. Consider too that this nation is your people.³⁹

God is persuaded and interrupts to say so. He says that His presence will be in attendance on the journey after all.⁴⁰ But Moses, like a lawyer who would rather argue than succeed, seems not to hear and continues: "how shall it be known that I have found favor in your sight, I and your people, unless you go with us? In this way, we shall be distinct, I and your people, from every people on the face of the earth."⁴¹ God consents once more.⁴²

Moses will represent Israel before God on later occasions, but these three, decisive instances more than justify Jeremiah's

38. *Exod.* 33:9,11.

39. *Id.* 33:12-13.

40. Muffs reads God's statement somewhat differently: God agrees here only to send His angel, not Himself. See MUFFS, *supra* note 34, at 14-16.

41. *Exod.* 33:12-16.

42. "What is clear from the motivating appeals of Moses is that the prayer is not for an arbitrary or inconsistent action on God's part. It is a prayer for God to act according to the divine will and purpose as it has been manifest over and over again . . ." Patrick Miller, *Moses, My Servant: A Deuteronomic Portrait of Moses*, 41 INTERPRETATION 245, 253 (1987).

memory of Moses as one of Israel's greatest intercessors.⁴³ At Sinai a great divide opens between God and the people. Moses is in the middle, and three times this mouth for God must speak for the people to God.⁴⁴

IV. COUNSEL FOR THE SITUATION

When Moses stands there in the middle, representing God to the people and the people to God, he may act as what modern lawyers call "counsel for the situation." In order to explore the possibility, I must give a brief account of the history and significance of the relevant professional terms, and this means momentarily shifting focus from the strange story to the different but no less strange discourse of lawyers and of academic writing about the practice of law.

The notion of "counsel for the situation" is important in the practice of American law because it runs counter to the dominant idea that a lawyer in our adversarial system must always perform as a zealous advocate for an individual client's interests against all others. This dominant approach is well-justified. A person needs a lawyer whose competence, diligence, confidence, enthusiasm, and undivided loyalty she can rely on.

Nevertheless a lawyer's scorched-earth advancement of an individual client's interest is not always the need. For example, a family may want a single attorney to represent them as a whole for various reasons. (John Frank said that nothing requires "each of the relatives of the deceased to take different counsel to the funeral: if a half-dozen heirs were required to pay a half-dozen counsel, they would indeed have additional grounds for grief."⁴⁵) A group of business people may seek a lawyer to represent their joint interests as they undertake a common enterprise. Clients with a present or potential dispute may be determined to resolve their differences amicably and may turn to their attorney for her professional service.

"Counsel for the situation" is a way of thinking about such occasions, and in alliance with the idea that lawyers ought to serve the interest of the people and not the interests of large corporations only, it is also a way of introducing into discussion of lawyers' responsibility a possible obligation to communities, to

43. "Then the Lord said to me: Though Moses and Samuel stood before me, yet my heart would not turn toward this people." *Jer.* 15:1.

44. See *Deut.* 5:5. See also MICHAEL WALZER, *EXODUS AND REVOLUTION* 95 (1985).

45. John P. Frank, *The Legal Ethics of Louis D. Brandeis*, 17 *STAN. L. REV.* 683, 697 (1965).

relationships, to the public good, to something in addition to an individual client's interests. Thomas Shaffer has fruitfully called attention to these possibilities.⁴⁶

Louis Brandeis invented the term "counsel for the situation" to describe some of his work.⁴⁷ He also advocated the role of people's lawyer and was known for playing that role sometimes himself.⁴⁸ His heroic image continues to inspire public interest lawyering.⁴⁹

Brandeis became an Associate Justice of the Supreme Court after surviving opposition at contentious hearings on his nomination in 1916.⁵⁰ Although the opposition to him by leaders of the bar may actually have gone to the fact that he was "an intellectually powerful liberal and a Jew," its ostensible subject was his professional conduct.⁵¹

The term "counsel for the situation" was introduced publicly during the 1916 hearings, but the story of it begins with an epi-

46. See *supra* note 4. See also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); William H. Simon, *Visions of Practice in Legal Thought*, 36 STAN. L. REV. 469 (1984); David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992).

Clyde Spillenger has a good description of lawyering for the situation: It is to recognize and respect certain organic bonds, like family and other relationships, as deserving of representation. It is to suggest that the lawyer should be able to act as intermediary in situations that involve multiple but not necessarily adverse interests. . . . Sometimes the phrase refers to the role of lawyers as social reformers—making "the situation" synonymous with "the public" or "the public good."

Clyde Spillenger, *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L. J. 1445, 1502 (1996).

47. See John Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients in the Modern Legal Profession*, 1992 U. ILL. L. REV. 741, 748-53 (1993); Frank, *supra* note 45, at 698-703; Spillenger, *supra* note 46, at 1504-05 n.208. For a very interesting reflection on Brandeis in relation to Moses, see ROBERT BURT, *TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND* 124-26 (1988).

48. Brandeis said: "We hear much of the 'corporation lawyer,' and far too little of the 'people's lawyer.' The great opportunity of the American Bar is and will be to stand again as it did in the past, ready to protect also the interests of the people." LOUIS D. BRANDEIS, *THE OPPORTUNITY IN THE LAW, IN BUSINESS—A PROFESSION* 329, 337 (1933) (1905 address to the Harvard Ethical Society). On images of Brandeis as "attorney for the people," see Spillenger, *supra* note 46, at 1471 n.83, 1481 n.121, 1502-03.

49. See LUBAN, *supra* note 46; Spillenger, *supra* note 46.

50. See generally ALPHEUS THOMAS MASON, *BRANDEIS, A FREE MAN'S LIFE* 491-508 (1946); PHILIPPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 291-308 (1984); A.L. TODD, *JUSTICE ON TRIAL: THE CASE OF LOUIS D. BRANDEIS* 96-237 (1964).

51. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 58-59 (1978).

sode that took place in 1907.⁵² A tannery had accumulated large debts and could not meet the payments when they fell due. An owner of the business, James Lennox, together with one of his creditors and the creditor's attorney, sought Brandeis' advice. (Brandeis' firm represented one of the other creditors.) In the course of the conference, Brandeis determined that the tannery was insolvent and suggested that the assets be assigned to his law partner as trustee for the benefit of creditors in hope of saving the business from bankruptcy. Lennox adopted Brandeis' suggestion but did not understand that he was thereby gaining a trustee for the firm's property rather than a lawyer for himself. In the complexities that followed, bankruptcy became necessary, and Brandeis' firm represented the petitioning creditors in those proceedings. Lennox felt betrayed and retained another Boston lawyer, Sherman Whipple, to investigate.

Whipple met with Brandeis and later recounted the meeting at the 1916 hearings. He remembered Brandeis saying, among other things:

When a man is bankrupt and cannot pay his debts, . . . he finds himself with a trust, imposed upon him by law, to see that all his property is distributed honestly and fairly and equitably among all his creditors, and he has no further interest in the matter. Such was Mr. Lennox's situation when he came to me, and he consulted me merely as the trustee for his creditors, as to how best to discharge that trust, and I advised him in that way. I did not intend to act personally for Mr. Lennox, nor did I agree to. "Yes," I said, "but you advised him to make the assignment. For whom were you counsel when you advised him to do that, if not for the Lennoxes?" He said, "I should say that I was counsel for the situation. . . . I was looking after the interests of everyone."⁵³

In 1965 John Frank revisited the nomination hearings and Brandeis' action. He concluded that Brandeis had violated no standard of professional ethics, but he agreed with Whipple's criticism that Brandeis should have made clearer to Lennox what he was proposing.⁵⁴ Frank also thought that counsel for the situ-

52. See *Dzienkowski, supra* note 47, at 750-53; *Frank, supra* note 45, at 699-703; *Spillenger, supra* note 46, at 1505-11.

53. *Hearings Before the Subcommittee of the Senate Committee on the Judiciary on the Nomination of Louis D. Brandeis To Be an Associate Justice of the Supreme Court of the United States*, 64th Cong., 1st Sess., 287 (1916).

54. See *Frank, supra* note 45, at 702.

ation was a "misty phrase" and "one of the most unfortunate . . . [Brandeis] ever casually uttered."⁵⁵

Notwithstanding its colorable, inauspicious origin, the notion has survived doggedly and honorably. Reputable lawyers who were contemporaries of Brandeis had done the same thing, and lawyers still do.⁵⁶ In 1978, Geoffrey Hazard commended the practice as "perhaps the best service a lawyer can render to anyone."⁵⁷ Hazard argued that lawyering for the situation could be officially defined and should be officially recognized. When Hazard wrote, the American Bar Association had offered little guidance on the subject.

The ABA adopted its first set of standards, the *Canons of Professional Ethics*, at just about the time of Brandeis' involvement with Lennox and the tannery. Of these thirty-two aspirational Canons, one held that it was "unprofessional to represent conflicting interests, except by express consent of all concerned given after a full disclosure of the facts."⁵⁸ Beyond this, the Canons did not address what Brandeis and others were doing in situational representation.

In 1969 the ABA adopted a Model Code of Professional Responsibility that offered something more. According to one of its "disciplinary rules," lawyers may represent multiple clients if they provide full disclosure and "can adequately represent the interests of each."⁵⁹ One of the accompanying "ethical considerations" also provided that lawyers may serve as arbitrators or mediators for clients.⁶⁰ This is more than the earlier *Canons* offered, but not much clearer or more helpful.⁶¹ Hazard said

55. *Id.* Dzienkowski says: "One could interpret [it] in many different ways." Dzienkowski, *supra* note 47, at 752. Spillenger believes it "was not the expression of a lawyering metaphysic but a hurried and embarrassed response to a question put to him by hostile counsel." Spillenger, *supra* note 46, at 1507.

56. The charge against Brandeis "did not so much collapse as become submerged in concessions from other reputable lawyers that they had often done exactly as Brandeis." HAZARD, *supra* note 51, at 61. Lawyers told Hazard that lawyering to the situation described settings in which they had found themselves. *See id.* at 61-62.

57. *Id.* at 65. *See also id.* at 7, 61-62; Spillenger, *supra* note 46, at 1503-04.

58. CANONS OF PROFESSIONAL ETHICS Canon 6 (1908).

59. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(c) (1982). The "ethical considerations" that accompanied the rule expressed concern for a lawyer's independence of judgment and loyalty to her client but accepted the propriety of representing multiple clients with differing interests outside the context of litigation so long as there was full disclosure and client consent. *See id.* EC 5-14 to 5-16.

60. *Id.* EC 5-20.

61. *See* HAZARD, *supra* note 51, at 62-64; Dzienkowski, *supra* note 47, at 759-62.

that it allowed "only a fragment of [lawyering for the situation], and with some reluctance at that."⁶²

Hazard became the reporter for the next installment, the 1983 *Model Rules of Professional Conduct*, produced by an ABA commission. His influence is to be detected in Rule 2.2 which allows a lawyer to "serve as an impartial arbitrator or mediator between clients."⁶³ Thomas Shaffer believes that the rule is stingy and not as generous as Brandeis would have wanted but useful nonetheless. In his judgment it bears possibilities for understanding that lawyers may represent families and other communities and, in doing so, represent the harmonies of the relationships.⁶⁴

Meanwhile a committee of the American Law Institute, which Hazard now directs, has been at work on a *Restatement of the Law Governing Lawyers*. The 1996 final draft of the *Restatement* abandons the modest effort of Rule 2.2 on the grounds that the rule did not mean what it seemed to say and that, in any event, the term "intermediation" had not entered the professional vocabulary.⁶⁵ And a more recent commission, appointed by the ABA to review the *Model Rules*, agrees. It proposes eliminating Rule 2.2, replacing "intermediation" with "joint representation," and viewing the latter as a problem to be dealt with under the rule governing conflict of interest.⁶⁶

62. HAZARD, *supra* note 51, at 62.

63. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 (1992). Consultation and consent are required. There are other conditions, including reasonable beliefs that the undertaking will be successful and that there is little risk of prejudice to the clients' individual interests if it is not. See *id.* Rule 2.2 (a) (1) to (3). Each client must be able to make informed decisions, and the lawyer must believe that her representation will be impartial as well as compatible with her responsibilities to the individual clients.

Rule 1.7 is the general conflict of interest rule. For commentary on that rule and its relation to Rule 2.2, see Teresa Stanton Collett, *The Ethics of Intergenerational Representation*, 62 FORDHAM L. REV. 1453 (1994); Russell G. Pearce, *Family Values and Legal Ethics: Competing Approaches to Conflicts in Representing Spouses*, 62 FORDHAM L. REV. 1253 (1994). One learned commentator believes that the rule constitutes an improvement but that it "leaves many fundamental questions unresolved." Dzienkowski, *supra* note 47, at 745.

64. My representation of Shaffer is drawn from my correspondence with him and from his well-taken, influential treatment of the subject in Shaffer, *supra* note 4.

65. See *Restatement (Third) of the Law Governing Lawyers* §211 cmt. a (Proposed Final Draft No. 1, March 29, 1996) [hereinafter *RESTATEMENT*] ("Although its terminology might be thought to imply otherwise, Rule 2.2 addresses a particular setting for applying the general rules governing conflicts.").

66. See MODEL RULES OF PROFESSIONAL CONDUCT Proposed Rule 1.7 cmts. 27-32 (Proposed Draft, Mar. 23, 1999); *id.* Proposed Rule 2.2.

At present, lawyering for the situation stands just about where the 1969 *Model Code* left it: without much positive guidance.⁶⁷ It remains what Hazard described as “marginally illicit professional conduct,”⁶⁸ much as it was when Brandeis engaged in it at the beginning of the century.

Lawyers do serve as counsel for the situation and will continue to do so, even though the practice is probably destined to remain marginally illicit.⁶⁹ This is as it should be. A rule legitimating the practice, if the bar were to achieve a consensus on such a rule, would nonetheless be a rule, and no rule can carry a lawyer through the unstructured spaces of the situations at issue.⁷⁰

Brandeis intended no evil. He sought only to maintain his own autonomy,⁷¹ but that desire may have compromised his representation. In a careful reassessment of Brandeis’ practice, Clyde Spillenger finds that autonomy and high-mindedness were specifically characteristic of Brandeis’ lawyering for a situation. Brandeis typically sought to be fair to all and to harmonize competing interests. Typically, however, the fairness and harmony he sought were not what a sensitive inquiry into the goals and needs of the parties revealed. Rather, he “saw a ‘situation’ that he could solve, in the manner of a good Progressive problem-solver—a ‘one-man New Deal’—and he sought to impose a solution that made reference less to the expressed desires of the par-

67. The Restatement basically returns to the 1969 Model Code’s requirement of consent and adequate representation. Sections 209 and 210 cover, respectively, representation of multiple parties in civil and in criminal litigation. See RESTATEMENT, *supra* note 65, at §§ 209, 210. Section 211 covers multiple representation in non-litigation contexts. See *id.* at § 211. All three allow for representation of multiple parties where the clients consent. Client consent is covered by section 202 which requires that a client’s consent be based on “reasonably adequate information about the material risks of such representation.” *Id.* at § 202. This section also provides that, notwithstanding consent, it must nevertheless be “reasonably likely that the lawyer will be able to provide adequate representation.” *Id.*

68. HAZARD, *supra* note 51, at 64.

69. Dzienkowski warns that Brandeis’ concept is “no longer viable in the modern legal profession.” Dzienkowski, *supra* note 47, at 748.

70. Hazard notes that bar association advisory opinions are abstract and dogmatic and, as “clean-cut answers to hypothetical problems,” not really illuminating “for the messy ethical questions of real life.” HAZARD, *supra* note 51, at 60.

71. He simply “saw himself,” Robert Burt suggests, “standing alone at the margin of his society” where he resisted affiliation with groups, causes, and clients, and preserved his autonomy. BURT, *supra* note 47, at 9.

ties involved than to a vision nurtured by and known only to himself."⁷²

Lawyering for the situation is a tricky business, trickiest of all, perhaps, for those who, like the heroic Brandeis, intend to do good by engaging in it.⁷³ In representing a detached vision of his own, Brandeis was above the situation and not in it. His vision could be a good vision with good intentions and good results. It was nonetheless his own.

The ABA's 1983 Model Rule 2.2, that allows attorneys to act as intermediaries—the official version of lawyering to a situation—expresses some concern for the extra risks to which clients are exposed in these circumstances. The interpretive comments that follow the rule thus direct the lawyer to be mindful of additional costs, embarrassment, and recrimination that failure could produce for clients.⁷⁴ But the lawyer is not thought of as having anything at stake. The rules say nothing about her venturing herself. Or her fee. If the attorney takes the job and in the process foresees trouble, she is directed simply to withdraw, apparently with her fee and her reputation for independence intact. The implied ideal is that of an attorney, like Brandeis, situated

72. Spillenger, *supra* note 46, at 1509. This is to specify and extend Robert Burt's observation that "Brandeis always turned away; he always found a place to stand alone." BURT, *supra* note 47, at 9.

73. Dzienkowski notes:

[In these instances] the clients bear a risk that is not present in other types of representations. This risk relates primarily to the fact that the lawyer does not owe his or her loyalty exclusively to one client's interests. Further, most intermediations arise outside of the litigation context, and thus are not supervised by an impartial trier of fact or law.

Dzienkowski, *supra* note 47, at 775 n.184.

Derrick Bell noted about civil rights lawyers in the 1970's: "Idealism, though rarer than greed, can be especially hard to control" and can be especially dangerous. Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 504 (1976).

Owen Fiss noted about one lawyer for the situation in the abolitionist cause: "In invoking humanity's interest in freedom, Dana [stood] in danger of substituting his own conception of the good—or that of the privileged group to which he belongs—for that of the collectivities he [purported] to represent." Owen M. Fiss, *Can a Lawyer Ever Do Right?*, 17 CARDOZO L. REV. 1859, 1862 (1996).

74. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. (1983). The rule itself provides that, before a lawyer acts as an intermediary, she must believe that there is little risk of prejudice to client interests if she fails to achieve success. See *id.*

above the situation, detached from the clients and the joint enterprise.⁷⁵

Geoffrey Hazard had a contrary view back in 1978: An attorney may be entrusted with the role of intermediary "only if he knows that in the event of miscarriage he will have no protection from the law" and only if success prevents his performance from being questioned afterwards.⁷⁶ I read Hazard's admonition to mean that an attorney may be entrusted with the role only if she is fully, vulnerably invested in the situation—like Moses.

V. MULTIPLE VOICES

Moses never surrenders his office as mouth for God. He is as aligned with God as a mortal can be. And yet he is aligned with the people and speaks for them.⁷⁷ When he stands at the outermost reaches close to God—the text gives it geographical location on the mountaintop surrounded by a cloud—he is physically separated from the people but not humanly detached from them. His identification with them takes poignant form in the narrative.

Just when God finishes speaking the law to Moses and gives him the stone tablets, the people's idolatry interrupts. In His fury, God would be let alone "so that my wrath may burn hot against them and I may consume them."⁷⁸ But that is not all that God says. He has a last comment. He will consume the people, "and of you," He adds, speaking to Moses, "I will make a great nation."⁷⁹

75. Such detachment is not on its face an unsound idea. There are circumstances when an attorney should be independent. But Spillenger makes a well-taken point:

[T]he Lennoxes of this world probably fall in the vast middle of a universe of clients bounded by 'powerful, amoral corporations' (from which a lawyer should exercise independence), on one side, and 'disempowered individuals' (with whom a lawyer should engage in empathetic dialogue), on the other. A lawyerly ethic that counsels independence from a client's unlawful or immoral goals does little to explain Brandeis's instincts in the Lennox case—his lack of interest in solutions other than his own.

Spillenger, *supra* note 46, at 1510-11.

76. HAZARD, *supra* note 51, at 67.

77. Hanna Pitkin establishes and elaborates two basic types of representation: that of mandate and that of independence. See PITKIN, *supra* note 24. In speaking for God and the people, Moses performs in both instances a role that is sometimes following a mandate and sometimes an exercise of creative independence.

78. *Exod.* 32:10.

79. *Id.*

Moses lingers. His response is to say nothing about the offer of a kingdom of his own. He pleads instead for the people, for the nation that is his now, such as it is. This is the first of his great intercessions on the people's behalf, and it changes God's mind. Arthur Jacobson notes about the moment that "[t]he highest political drama . . . is whether Moses will become a new Pharaoh."⁸⁰ He does not.⁸¹

When Moses returns to the mountain to make atonement for the people's sin and to intercede powerfully for them the second time, what he says is: "'Alas, this people has sinned a great sin; they have made for themselves gods of gold. But now, if you will only forgive their sin—but if not, blot me out of the book that you have written.'"⁸²

This is not simply to resist the offer to become a new Pharaoh. Moses now places himself fully with the people. God has written a book. If God is to destroy the people, Moses asks to be erased from the book. No longer to be written in God's book is more than to have resisted the Pharaonic temptation and worse than to be unremembered. It is not to have existed at all. Moses risks all that he has and is.

Moses' advocacy in this situation poses a difficulty of interpretation. Is he to be read as both mouth for God and voice of the people? If so, does he slip from one role into another? Is he duplicitous?

The problem can be resolved by saying simply that Moses speaks for the situation. Along this line it can be noted that he identifies with and pleads for "this" people, not "these" people, and therefore for the collective, for the enterprise, for both God

80. Arthur Jacobson, *The Idolatry of Rules: Writing Law According to Moses with Reference to Other Jurisprudences*, 11 CARDOZO L. REV. 1097-98 (1990). Jacobson's underlying point is that Freud got it backwards. Freud proposed that Moses was a distinguished Egyptian who joined a group of culturally inferior immigrants. See SIGMUND FREUD, *MOSES AND MONOTHEISM* (1939). "The text is not hiding the secret that Moses was an Egyptian prince. Moses is telling us that he risked setting up as Pharaoh." Jacobson, *supra*, at 1097-98.

81. Christian tradition singles out for celebration and memory Moses' resistance to forms of the Pharaonic temptation: "By faith, Moses, when he was grown up, refused to be called a son of Pharaoh's daughter, choosing rather to share ill-treatment with the people of God than to enjoy the fleeting pleasures of sin." *Heb.* 11:24-25.

Moses' resistance to the Pharaonic temptation renders especially ironic the claims of the rebels that he had engineered the exodus for his own purposes. See *Num.* 16:12-14. Compare *Num.* 10:29-32, with *Num.* 13, and James S. Ackerman, *Numbers*, in *THE LITERARY GUIDE TO THE BIBLE* 80, 83 (Robert Alter & Frank Kermode eds., 1987) [hereinafter *LITERARY GUIDE*]. See also *Num.* 11:11ff.

82. *Exod.* 32:31-32. God's response begins: "Whoever has sinned against me I will blot out of my book." *Id.* 32:33.

and people together. Or it can be argued that acting as an intermediary sometimes requires representing one party to another or changing roles within a developing situation. This reading solves the problem of double voice but only by raising it to a higher level, from Moses to God: If Moses speaks for the situation, he still acts as God's mouth, but then he speaks for a forgiving God and an angry God.⁸³ In the stories, God certainly acts as first the one and then the other by turns. And Moses' intercessions succeed in convincing God to change from one to the other. God does respond to intercession on the people's behalf.

This is a valid reading. I take a somewhat different approach. I think that Moses' intercessions at Sinai are genuinely intercessory, are prayers to God for the people, because they arise out of the word of God: Moses is mouth for the people exactly because he is mouth for God.

VI. ONE VOICE, MULTIPLE RISKS

At the beginning, at the burning bush, Moses objects: "I have never been eloquent" and God answers: "Who gives speech to mortals? . . . Go and I will be with your mouth and teach you what you are to speak."⁸⁴ God supplies Moses with the words he speaks to the Pharaoh and to the people. He also supplies Moses with the words Moses speaks to God. God's word returns to Him as intercession.

Moses' first intercession at Sinai is a precise example. He has made several roundtrips to the mountain summit. As chapter 32 of *Exodus* opens, the reader assumes that Moses has returned to the top for the last time. There is expectation that the vertical movement of ascending and descending will now translate into horizontal progress across the desert plain and that the energy of exchanges between summit and base will now fuel the long march forward to Canaan.

83. Yochanan Muffs proposes that the prophet is not only the messenger from the heavenly court but also an independent advocate to the court whose prayer and intercession seek rescission of the "evil" decree: "He is first the messenger of the divine court to the defendant, but his mission boomerangs back to the sender. Now, he is no longer the messenger of the court; he becomes the agent of the defendant, attempting to mitigate the severity of the decree." MUFFS, *supra* note 34, at 9. God is then imagined as subject to conflicting emotions of justice and mercy:

If there is no balance in the divine emotion, if justice gets the upper hand over mercy, then the world is placed in great danger. Therefore, God allows the prophet to represent in his prayer His own attribute of mercy, the very element that enables a calming of God's feelings.

Id. at 33.

84. *Exod.* 4:10-12.

Already from prior exchanges, law has come down the mountain in oral form and been agreed to and set out in writing.⁸⁵ Already there has been a promise that, with this law in their midst and with the doing of it, the people will be led by an angel and that terror, confusion, and pestilence will precede them to cut a path of destruction through their enemies.⁸⁶

It remains only for Moses to descend with the two tablets of stone and to deposit them in the mobile ark. Then, with production of the required equipment completed, Israel will be set in motion once more. At the end of chapter 31 Moses has the law stones in hand and is ready to descend. That is just about where chapter 34 later picks up the story with God parading his glory before Moses on the mountain top in rehearsal of the passage God will make in company with the people below.⁸⁷ Then the two stones make their final descent safely, all the way down. And when at last they are placed in the ark,⁸⁸ the people embark, charged by their law and the presence of God.

The story has moved from the revolt in Egypt, to the liberation of the people in the Exodus, to the founding of the nation's freedom at Sinai. And it is in process of turning north to complete the trajectory when chapter 32 intervenes.⁸⁹ The forward movement is brought to a sharp and unanticipated halt, and its continuation is thrown into radical doubt.

The story precipitously takes us to the edge of the abyss. The people have abandoned their being. It is impossible. But it is done. And what must follow, but that the people and the journey must end? Having already ended in an act of self-destruction?

God's speaking in chapter 31 concludes in the two stone texts. Moses stands there, clutching them, when, in chapter 32, God's fury breaks out. Facing God, Moses intercedes for Israel. And his final, intercessory argument in this scene, the one that

85. *See id.* 19:3-8, 24:1-8.

86. *See id.* 23:23-33.

87. *See id.* 34:6-7, 33:17-23. The poetic link between God passing before Moses and Israel in the company of God passing before other peoples is suggested by the juxtaposition of *Exodus* 34:6-7 and *Exodus* 34:8-14.

88. *See id.* 40:20.

89. To be sure, the text has yet to give us the making of the tabernacle and vestments. But what reader does not gladly pause for the pre-journey nourishment of the text's wonderful description of the extraordinary tent and its covering, the ark and mercy seat, the altar, the lamps and hangings, the finely worked garments, and the robe finished all around the hem with alternating bells of gold and pomegranates of blue, purple and crimson yarn. The details delight the imagination, and the reading time passes quickly.

changes God's mind, is the express return of words God had sent earlier:

Remember Abraham, Isaac, and Israel . . . how you swore to them by your own self, saying to them, "I will multiply your descendants like the stars of heaven" And then the Lord changed his mind Then Moses turned and went down from the mountain, carrying the two tablets of stone.⁹⁰

God's word sends Moses to Egypt and returns him fruitfully to Sinai with the gathered Israel. It brings him to the mountain summit where he will receive more words and where he may now intercede for the people. And as he speaks, the word assembles around itself the various arguments he offers. And then—simply, decisively—it emerges expressly: Moses quotes God to God to produce a reversal in judgment.⁹¹ And the quoted words provide, as well, an interval for further intercessions. And the further intercessions allow the law stones to reach the people. And these words, too, will have issue. Entailed in God's speaking is a return and in the hearing a return speaking.

Participation in this cycle leaves all parties—God, Israel, and Moses—vulnerable in unresolved tension.

A. *God*

The recent writings of the systematic theologian Robert Jenson and the biblical theologian Walter Brueggemann provide a helpful point of departure.

The Greeks, Jenson notes, assumed that gods—to be gods—must be immune "to time's contingencies and particularly to death."⁹² The Olympian gods are immortal. In the biblical sagas, Israel begins with no such assumption. Unlike the gods of Olympus, the God of the biblical sagas is vulnerable to time. In the stories, He is personally engaged: He changes His mind, reacts to events, makes threats and repents of them.

90. *Exod.* 32:13-15. What is to be made of the fact that Moses, in smashing the stones, erases God's words written by God? Is this an act extending God's wrath: Moses destroys that which would have mobilized and animated the people? Is this an act of mercy: If the words God has written enter the camp at the moment Israel is in the midst of its festival of idolatry, the word will break out and consume them? Is this a pedagogical act, as Arthur Jacobson proposes: Moses' smashing the stones to teach the people that this engraved stone is not an idol?

91. In the Christian tradition, believers return God's express words to him in the Lord's Prayer.

92. 1 ROBERT JENSON, *SYSTEMATIC THEOLOGY* 94 (1997).

Brueggemann points out that the people start with no generic notion of God at all.⁹³ From the beginning, what they know of God is what God reveals to them about Himself in relation to them and their history, along the way. "Even where God is said to be elsewhere," Brueggemann notes, "this 'elsewhere' is most often in response to Israel's life, either negatively or positively."⁹⁴ God is the God of Israel. He is not detached. He is not "above the fray"; indeed, He is "at risk in the ongoing life of Israel."⁹⁵

When Moses addresses God at Sinai—the word returning to its speaker—his three intercessions are versions of a single theme: He appeals to this vulnerability of God. He appeals to God to be God. He is not speaking from or to a different God. He is speaking to the God of Israel.

In the first scene, God sees Israel's idolatry. Their worship of the calf is an act of self-annihilation. God directs Moses to leave; He wishes to be let alone so that He may consume the people and make another nation of Moses. But this God, because He is God, cannot be left alone. Moses' argument is a reminder that Israel is the nation to which God has committed himself.⁹⁶ Israel has done the impossible in its sin. God must overcome the impossible with the possibility of a future, for He, no less than Moses, cannot be Himself without Israel. He is the one who is faithful over against Israel's faithlessness. He cannot be left alone, and He cannot be left not alone but with another nation.

In the second scene, Moses acknowledges Israel's sin and then says: "if you will only forgive their sin—but if not, blot me out of the book that you have written."⁹⁷ Moses places himself fully at risk with Israel. His doing so reminds God that God, too, is at risk with Israel. What book would there be without Moses? What God would there be without the book with Moses? God is the God of this nation in this book.

The third intercession is offered in the tent of meeting. In the course of it, Moses reminds God "that this nation is your people."⁹⁸ If God is not present with them as they move out for Canaan, Moses asks, "how shall it be known that I have found favor in your sight, I and your people, unless you go with us? In

93. See WALTER BRUEGGEMANN, *THEOLOGY OF THE OLD TESTAMENT: TESTIMONY, DISPUTE, ADVOCACY* 144 (1997).

94. *Id.* at 83.

95. *Id.*

96. See *Exod.* 32:7-14.

97. *Id.* 32:30-4.

98. *Id.* 33:13.

this way, we shall be distinct, I and your people, from every people on the face of the earth."⁹⁹ Without God, Israel could not be known as God's people. Without this distinction, with only the mass of humanity, God could not be known as the God of Israel. What would distinguish Him? To speak for God is to speak for the people.

B. *Moses*

Moses is fully invested in the people, prepared to be erased with them, and yet this leader of Israel is a fugitive Egyptian prince. And in the course of the long journey through the desert from Egypt to the promised land, his sister and brother lead a democratic revolt against him that he puts down.

His relation to God is no less tense. It is so from the beginning. Moses had yielded to God's commission and was returning to Egypt when "the Lord met him and tried to kill him."¹⁰⁰ The text offers no mitigating explanation and instead deepens the mystery. God let him alone, it says, after Zipporah hastily circumcised their son and "touched Moses' feet" with the foreskin.¹⁰¹

The tension remains to the end. Moses begs God: "Let me cross over to see the good land beyond the Jordan, that good hill country and the Lebanon."¹⁰² God rejects his plea. At the end of the long journey from Egypt, God will not allow Moses to enter the promised land. This is a painful lack of fulfillment for the conclusion of a remarkable, deserving life. The confoundment of it lives on in the stories and minds of the people. His exclusion is a punishment. His offense was committed in the process of drawing water from a rock.

In the desert, at Meribah, the people grow thirsty. There is no water. The people and their animals suffer. The people gather against Moses and Aaron and quarrel with them about their thirst and the absence of water. The story continues:

The Lord spoke to Moses, saying: "Take the staff, and assemble the congregation, . . . and command the rock before their eyes to yield its water. Thus you shall bring water out of the rock for them"

99. *Id.* 33:7-23.

100. *Id.* 4:25. When I read this passage over the telephone to Henry Schwarzschild, the former director of the ACLU's campaign against capital punishment project, his response was: "What does it mean: God *tried* to kill him?"

101. *Id.*

102. *Deut.* 3:25.

So Moses took the staff from before the Lord, as he had commanded him. Moses . . . gathered the assembly; together before the rock, and he said to them, "Listen, you rebels, shall we bring water for you out of this rock?" Then Moses lifted up his hand and struck the rock twice with his staff; water came out abundantly, and the congregation and their livestock drank. But the Lord said to Moses . . ., "Because you did not trust in me, to show my holiness before the eyes of the Israelites, therefore you shall not bring this assembly into the land that I have given them."¹⁰³

There are various possibilities for identifying Moses' offense.¹⁰⁴ For example: He was told to speak to the rock, but he struck it instead or struck it too many times or too hard and thus evinced lack of trust in the word. Or, when he asked the people "shall *we* bring forth water," he was taking credit for the miracle and thus succumbed to self-glorification, perhaps a version of playing God. Or there is no precise explanation of the details in the text. In any event, the text says he failed to show God's holiness.¹⁰⁵ There is no privilege and much hazard in serving as God's mouth. Like the rest of the generation of the pioneers, he, too, must die without crossing the Jordan.

When the end comes, the text delivers it simply. Moses climbs to the top of a mountain opposite Jericho:

[A]nd the Lord showed him the whole land . . . "This is the land of which I swore to Abraham, to Isaac, and to Jacob, saying, 'I will give it to your descendants'; I have let you see it with your eyes, but you shall not cross over there." Then Moses, the servant of the Lord, died there in the land of Moab, at the Lord's command. He was buried in a valley in the land of Moab, opposite Beth-peor, but no one knows his burial place to this day. Moses was one hundred twenty years old when he died; his sight was unimpaired and his vigor had not abated.¹⁰⁶

Moses is left outside in an unknown grave.

103. *Num.* 20:2-13.

104. See, e.g., MEIR STERNBERG, *THE POETICS OF BIBLICAL NARRATIVE* 107 (1981); PEAKE'S COMMENTARY ON THE BIBLE 225b, 264 (Matthew Black & H.H. Rawley eds., 1962); Ackerman, *supra* note 81, at 84-85.

105. Repeated at *Num.* 27:14 ("you rebelled against my word, you did not show my holiness").

106. *Deut.* 34:1-7.

C. *Israel*

"The Israelites wept for Moses in the plains of Moab thirty days; then the period of mourning for Moses was ended."¹⁰⁷ After Moses dies, the people mourn. And then they cease their mourning. They continue the journey with their God. They are dismayed. Nonetheless, they, God, the story, and the writer move on. The terms are the same: There is assurance, but also the ever-present tension.¹⁰⁸

For the people to bear the word through the desert and in the promised land, they must be holy, and, as Damrosch says, "to be holy, *qadosh*, is to be set apart; the root means 'separation, withdrawal, dedication. . . .' God himself repeatedly makes the point that the people's separateness is to mirror his own: 'Ye shall be holy, for I the Lord your God am holy.'"¹⁰⁹ Their separation requires certain political connections to others: "you shall love the alien as yourself, for you were aliens in the land of Egypt: I am the Lord your God."¹¹⁰ But these are connections formed in motion along the way. This people are aliens in Egypt, then wanderers in the desert, and their presence in the promised land "expresses not a sense of possession but a permanence of exile."¹¹¹ The land was possessed by others when Israel conquered it, and Israel, too, can be dispossessed in turn.

The people are displaced, always underway. They are to be holy for God is holy and therefore a people apart. They can never rest easy. God shares identity with Israel. As Jenson notes, however, God is identified with Israel without ceasing to stand over against her.¹¹² God is both settled in Israel and other than Israel.¹¹³

The settlement of God's word in Israel is unsettling and remains so. It unsettles Israel in the story, and it unsettles interpretation of the story. In the biblical saga, there will be no "after all is said and done." There will be, as Brueggemann puts it,

107. *Id.* 34:8.

108. It ends on what Patrick Miller describes as "a subversive note." PATRICK D. MILLER, *DEUTERONOMY, INTERPRETATION: A BIBLE COMMENTARY FOR TEACHING AND PREACHING* 244 (1990).

109. David Damrosch, *Leviticus*, in *LITERARY GUIDE*, *supra* note 81, at 74 (quoting *Lev.* 19:2).

110. *Lev.* 19:34.

111. Damrosch, *supra* note 109.

112. See Jenson, *supra* note 92, at 76.

113. Israel needs "to speak of God . . . as a 'settled' participant in her story with him, who yet is other than the perpetrator of the identification." *Id.* "God is identified *with* Israel in that he is identified *as* a participant *in* Israel's story with him." *Id.* at 77.

"another speech, another challenge, another invitation, another petition, another argument, which will re-open the matter" ¹¹⁴ God is both incommensurate with Israel and mutually engaged with her. In Israel's speech about God, the irresolution remains. "For after Israel has given witness to the relatedness of [this God], one who hears the testimony still wonders: What in fact is the nature of this relationship?" ¹¹⁵

CONCLUSION

A lawyer who accepts that she is to practice justice may bear in mind the biblical stories in some of which justice is a precise, practical, active form of regard for those who are types of fellow exiles and strangers along the way:

For the Lord your God is God of gods and Lord of lords, the great God, mighty and awesome, who is not partial and takes no bribe, who executes justice for the orphan and the widow, and who loves the strangers, providing them food and clothing. You also shall love the stranger, for you were strangers in the land of Egypt. ¹¹⁶

A lawyer who finds that the practice of justice requires contextual decisions case by case will certainly want to include the law and the rules of ethical conduct in her thinking as she assesses what a case requires of her. But she may also bear in mind biblical stories according to which all cases, professional rules, and legal merits themselves have a context:

When your son asks you in time to come, "What is the meaning of the testimonies and the statutes and the ordinances which the Lord our God has commanded you?" then you shall [say] to your son, "We were Pharaoh's slaves in Egypt and the Lord brought us out of Egypt with a mighty hand" ¹¹⁷

A lawyer who finds that her contextual decision about justice leads her to act as counsel for a situation may remember the story of Moses and how he was free to put himself at risk together with the other participants. She will know not to expect safety or certainty but to expect that she will not be alone and will be carried through this like other unstructured moral and legal spaces.

A lawyer who acts as such counsel and in consequence discovers herself in trouble with the bar or the legal system will

114. BRUEGGEMANN, *supra* note 93, at 83.

115. *Id.*

116. *Deut.* 10:17-19.

117. *Id.* 6:20.

remember something else: She will remember that both the bar and the system are constructed and not given worlds. Walter Brueggemann observes that the biblical world is one spoken into availability and that there is, absent speech, no objectively given world that stands as a measure of the reality of the biblical one.¹¹⁸ There are many other spoken worlds. Those among them that are regarded as something other than spoken, regarded as perhaps necessary or natural, have only been "spoken so long, so authoritatively, and so credibly that they appear to be given."¹¹⁹ The biblical texts debunk false claims. They do so not by counterclaiming that their world is more truly given. They do so by engendering critique and liberation as it is the nature of the word of God in the story to do. The story serves "as a subversive protest and as an alternative act of vision"¹²⁰

The Moses saga is thoroughly and patently a world of words. Beyond the interaction of its particulars with the particulars of law—the role of rules, lawyering for a situation—it advances a more general, curing challenge. The American legal system and its subsidiary institutions like the American Bar Association are worlds that have been long, authoritatively, and credibly spoken. Against their settling into the self-destructive attitudes and establishments of givenness, the Moses saga projects: an unsettling God, an unsettled people, and a chosen, ravaged man of law.

118. See Brueggemann, *supra* note 94, at 723.

119. *Id.*

120. *Id.* at 713 (emphasis omitted).

